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REPLY TO BERNARDSVILLE OFFICE

January 31, 2014

VIA ELECTRONIC FILING BY ECFS

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Room TW-A325
Washington, D.C. 20554

Comment to Notice of Proposed Rulemaking
Adopted and Released September 26, 2013

In the Matter of:

Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies (WT Docket No. 13-238);

Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting (WC Docket No. 11-59);

Amendment of Parts 1 and 17 of the Commission's Rules Regarding Public Notice Procedures for Processing Antenna Structure Registration Applications for Certain Temporary Towers (RM-11688 (terminated)); and

2012 Biennial Review of Telecommunications Regulations (WT Docket No. 13-32)

Dear Madame Secretary:

We are counsel to the New Jersey State League of Municipalities (the "League"), which represents all 565 municipalities in the State. The League is a statutorily authorized association organized to address legal, political and social issues of vital public importance to its members. *N.J.S.A.* 40:48-22. It has been in existence since 1915. The League has appeared as *amicus curiae* in over fifty (50) reported cases in New Jersey State or Federal courts.

The League is in a particularly suitable position to be heard with respect to issues for which the Federal Communications Commission (the "Commission" or "FCC") has requested comment through the Notice of Proposed Rulemaking ("NPRM") in the above-referenced matters, particularly as to the proposed rule implementing Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012("Section 6409(a)")[1].

The League submits this Comment to express its grave concern that the NPRM may result in federal requirements that are inconsistent with local community needs, interests, and values. The League believes that, by depriving local authorities of any discretion in reviewing land use applications, the proposed rule will not only disturb the necessary balance between federal communication policy and local oversight, but also result in State and local officials being commandeered to enforce a federal zoning program, which would be impermissible under the system of "dual sovereignty" mandated by the Federal Constitution.

The League strongly supports the positions expressed by the Intergovernmental Advisory Committee ("IAC") in its Advisory Recommendation No. 2013-13 to the Commission. Although The League applauds the FCC's intent to promote the deployment of infrastructure to advance wireless broadband services, it agrees with the IAC that "there is no broad-based, national problem that merits a one-size fits all rule from the Commission dictating local land use practices."

In this Comment, the League will first address the general policy and constitutional issues implicated in the proposed rule to implement Section 6409(a), then offer some comments regarding some specific terms contained in this rule.

Balance between Federal Communication Priorities and Local Concerns

As an initial matter, the Commerce Clause does not prohibit States from regulating matters of legitimate local concern, such as zoning, even though such regulation may incidentally affect interstate commerce. *Guschke v. City of Oklahoma City*, 763 F.2d 379 (10th Cir. 1985) (holding that federal interest in free flow of interstate commerce did not preclude a city's zoning height limitations if the restraint had only incidental impact on interstate commerce, because state's interest in zoning was great and the height restrictions, as imposed in residential areas, were not, in either purpose or effect, protectionist measures) (citing *U.S.C.A. Const*. Art. 1, § 8, cl. 3).

The Commission's peremptory authority has also been clarified and limited by the Supreme Court of the United States in *Louisiana Public Service Commission v. FCC*, 476 U.S. 355 (1986). There, the Court held that the FCC may preempt state regulation of an intrastate matter only when (1) the matter has interstate aspects as well and it is not possible to separate the interstate and the intrastate components of the FCC regulation; (2) FCC preemption is necessary to protect a valid federal regulatory objective; and (3) state regulation would negate the exercise by the FCC's lawful authority because regulation of the interstate aspects of the matter cannot be unbundled. *Id*. at 375 & n4.

[1] Under Section 6409(a), "a State or local government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station." An argument can be made that the Middle Class Tax Relief and Job Creation Act was itself an inappropriate vehicle for telecommunication changes.

Local discretion is not only essential for maintenance of the "dual sovereignty" mandated by our Constitution, but is also necessary to balance federal policy goals against local concerns. As one legal scholar has observed:

> Local zoning is far too narrow in scope, and local governments lack the legal authority and political and economic incentives to consider the cumulative impact of local decisions and respond accordingly. At the same time, *centralized federal agencies lack the detailed knowledge necessary to make context-specific land-use decisions. The very distance that enables the national government to establish general policies in furtherance of national goals prevents the federal government from efficiently and effectively implementing these polices at the local level, where the costs are concentrated*.

Ashira Pelman Ostrow, Land Law Federalism, 61 Emory L.J. 1397, 1436 (2012)(emphasis added).

When implementing federal land-use policies, local officials effectively act as "double agents," serving both the federal government and the local community. As federal agents, local officials further federal policy goals, but as agents of the community, local officials "actively tailor broad national land use policies to accommodate local geographic and economic conditions, and community preferences." *Id*. at1436-37.

Local officials, being a part of the local community and politically accountable to it, have the nuanced knowledge and local sensibilities necessary to regulate land. Moreover, local implementation preserves traditional federalism values—"avoiding the undue concentration of regulatory authority in one level of government; fostering democratic accountability and responsiveness; and leaving ample room for local variation, innovation, and competition." *Id*. at 1442-44.

Thus, in taking action, the FCC should carefully strike a balance between communications-based federal priorities and local land-use concerns, on which the Commission has no special expertise.

In this instance, the rule proposed to implement Section 6409(a) would prohibit state and local regulators from having any input on decisions that will shape the environment and economy of New Jersey's communities. They would not be allowed to consider any alternatives. They would also be denied the opportunity to consider conditions for prior approval of the existing structures, or determine whether a building or safety code, or a state's environmental or historic preservation law, will be violated.

As a result, the NPRM, which is not narrowly tailored, will negatively disturb the balance between federal regulatory objectives and local oversight. Thus, the League agrees with the IAC that "wherever any doubt exists as to whether the Commission or its staff should exert substantive or procedural authority over individual land use, regulatory and safety decisions, the Commission should refrain from doing so, and defer to the authority of the applicable local bodies and authorities, subject to review by courts with local jurisdiction."

Unconstitutional Commandeering of Local Officials to Administer a Federal Zoning Program

Significantly, by depriving local officials of any discretion, the NRPM will in effect commandeer local officials to act as administrative agents for a federal program, thus violating the U.S. constitution. *Printz v. United States*, 521 U.S. 898, 918-22, 117 S. Ct. 2365, 2376-78, 138 L. Ed. 2d 914 (1997); *New York v. United States*, 505 U.S. 144,188 166, 112 S.Ct. 2408, 2435, 120 L.Ed.2d 120(1992) (holding that "[t]he Federal Government may not compel the States to enact *or administer* a federal regulatory program") (emphasis added). The Supreme Court in *Printz* stated as follows:

> It is incontestible that the Constitution established a system of "dual sovereignty." Although the States surrendered many of their powers to the new Federal Government, they retained "a residuary and inviolable sovereignty," The Federalist No. 39, at 245 (J. Madison). This is reflected throughout the Constitution's text, including (to mention only a few examples) the prohibition on any involuntary reduction or combination of a State's territory, Art. IV, § 3; the Judicial Power Clause, Art. III, § 2, and the Privileges and Immunities Clause, Art. IV, § 2, which speak of the "Citizens" of the States; the amendment provision, Article V, which requires the votes of three-fourths of the States to amend the Constitution; and the Guarantee Clause, Art. IV, § 4, which "presupposes the continued existence of the states and ... those means and instrumentalities which are the creation of their sovereign and reserved rights." Residual state sovereignty was also implicit, of course, in the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones, Art. I, § 8, which implication was rendered express by the Tenth Amendment's assertion that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."
>
> *The Framers' experience under the Articles of Confederation had persuaded them that using the States as the instruments of federal governance was both ineffectual and provocative of federal-state conflict.*
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> . . . .
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> This separation of the two spheres is one of the Constitution's structural protections of liberty. "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." . . . *The power of the Federal Government would be augmented immeasurably if it were able to impress into its service-and at no cost to itself-the police officers [local officials] of the 50 States.*

Printz, 521 U.S. at 918-22, 117 S. Ct. at 2376-78 (internal case citations omitted) (emphasis added).

Here, despite the Commission's professed intention not to be a "national zoning board," the IAC correctly concludes in its Recommendation that "the Commission [through the NPRM] is indeed considering a level of involvement that would in effect make it the national zoning board." *See also Town of Deerfield v. FCC*, 992 F.2d 420 (2d Cir.1993) (the Commission affirmed there that it did not want to become "a national zoning board"). Significantly, by commandeering the local authorities to approve land use applications to effectuate federal priorities, and by simultaneously denying them any discretion, the Commission will be coercing local authorities to administer a federal zoning program in clear violation of the federal Constitution. *Printz*, 521 U.S. at 918-22, 117 S. Ct. at 2376-78; *New York*, 505 U.S. at 188, 112 S. Ct. at 2435.

Accordingly, to avoid constitutional violation and unnecessary future litigation, the Commission should preserve local discretion by carefully interpreting statutory language such as "substantial change of the physical dimensions" and "may not deny and shall approve" in a balanced fashion. In addition, the Commission should refrain from dictating to state and local governments who shall be the appropriate local official to review land use applications, *i.e.*, not to direct administrative staff, instead of elected or appointed boards, to review all applications, as contemplated in the NPRM.

Lastly, in the eventual final rule, the FCC should confirm that there are "special circumstances" under which Section 6409(a) would permit a State or local government to deny an otherwise covered request.

Specific Comments to the Proposed Rule Implementing Section 6409(a)

Substantial change of the physical dimensions

First and foremost, the League strongly objects to the imposition of rigid tests interpreting "substantial change of the physical dimensions" of wireless structures as found in Section 6409(a). [2] The League agrees with the IAC that the question of substantiality cannot be resolved "by the adoption of mechanical percentages or numerical rules applicable anywhere and everywhere in the United States, but rather must be evaluated in the context of specific installations and a particular community's land use requirements and decisions."

[2] Under the test proposed in the NPRM, a modification of an eligible support structure would result in a substantial change in the physical dimension of such structure if
(1) the proposed modification would increase the existing height of the support structure by more than 10%, or by the height of one additional antenna array with separation from the nearest existing antenna not to exceed twenty feet, whichever is greater, except that the proposed modification may exceed the size limits set forth in this paragraph if necessary to avoid interference with existing antennas; or
(2) the proposed modification would involve the installation of more than the standard number of new equipment cabinets for the technology involved, not to exceed four, or more than one new equipment shelter; or
(3) the proposed modification would involve adding an appurtenance to the body of the support structure that would protrude from the edge of the support structure more than twenty feet, or more than the width of the support structure at the level of the appurtenance, whichever is greater, except that the proposed modification may exceed the size limits set forth in this paragraph if necessary to shelter the antenna from inclement weather or to connect the antenna to the support structure via cable; or
(4) the proposed modification would involve excavation outside the current structure site, defined as the current boundaries of the leased or owned property surrounding the structure and any access or utility easements currently related to the site.

As a threshold matter, without appropriate limitation, a wireless carrier can conceivably use successive applications to change the size of a structure " less than 10 percent" each time, resulting in cumulative changes of over 50 % or even 100%, all without any oversight from local authorities. Consequently, an accumulative limitation on multiple applications regarding the same structure within a certain time period is necessary. In addition, local authorities are best situated to set such limits based upon individual circumstances surrounding each structure.

In addition, a change in a structure's size, even if less than the limits proposed in the NPRM, may adversely affect substantial safety, esthetic or quality-of-life elements, thus representing a substantial change in the physical dimensions of a structure. Instead, any change in physical dimensions, whether in height, weight, bulk, or visual impact, must be considered. We strongly support the Recommendation No. 9 of the IAC that

> Any change in physical dimensions that would (1) violate a building or safety code; (2) violate a federal law [or state] regulation such as an environmental law, historic preservation law, FCC RF emissions standards, FAA requirements, etc.; or (3) violate the conditions of approval under which the site construction was initially authorized, should be considered a substantial change in the physical dimensions.

Importantly, the League believes that by using the term "substantial," Congress expressed an intent to subject covered requests to the reasonable discretion of local zoning officials. Actually, that term is one of the most widely used in States' zoning statutes, being present in almost 1,000 zoning statutes of different States.[3] By incorporating the "substantiality" test, these zoning laws grant local boards discretion[4] to consider the individual circumstances surrounding each application. Here, there is no sound basis to distinguish Congress' use of this term as categorically different. In fact, by using this term, Congress exhibits an intent to balance federal objective and local interests. Therefore, the "substantiality" test contained in Section 6409(a) should ultimately be committed to the sound discretion of local boards and courts. Although the Commission can provide some uniform regulatory guidance, such guidance cannot be so mechanical as to render the Congress' expressed intent meaningless.

"Existing" structures

Under Section 6409(a), a wireless tower or base station must be "existing" in order for its modification to be covered. According to the proposed rule, an existing "base station" includes only a structure that "currently" supports or houses base station equipment. Verizon seeks to expand this by arguing that modifications of base stations "encompass collocations on buildings and other structures, even if those structures do not currently house wireless communications equipment." See NPRM, Para. No. 111. The Commission should reject this argument. Otherwise, if it were to follow the approach advanced by Verizon, the Commission would drastically rewrite the definition of "base station" and permit wireless carriers to convert any structures currently in use into wireless base stations without any local input.

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[3] *See e.g, NY TOWN* § 267-b, *N.J.S.A.* 40:55D-70, *VA ST* § 15.2-2298, *MA ST* 40A § 10, *MD LAND USE* § 4-207, *NH ST* § 424:6, and *etc*.

[4] *See e.g, Grimley v. Vill. of Ridgewood*, 45 N.J. Super. 574, 581(App. Div. 1957)(the board of adjustment thus enjoys "the quasi-judicial discretion under the supervisory discretion (which seems to partake of both the judicial and the legislative) of the local governing body")

"May not deny and shall approve" and "special circumstances"

According to Section 6409(a), States and localities "may not deny and shall approve" covered requests that meet the definition of eligible facilities requests and do not result in a substantial change in the dimensions of the facility. The Commission has asked whether Section 6409(a) permits limitations on which officials may review an application. The NPRM further asks "whether the Commission should direct whether administrative staff as opposed to an elected board should review all applications." In addition, the Commission seeks comment on whether there are any special circumstances under which Section 6409(a) would permit a State or local government to deny an otherwise covered request.

For the same reasons discussed in detail in the prior sections of this Comment, it is neither good policy nor constitutionally permissible for a federal agency to dictate to state and local authorities that administrative staff, instead of elected or appointed boards, should review land use applications.

In addition, notwithstanding this unqualified language, the League believes that there should be "special circumstances" under which local authorities can deny an otherwise covered request. Such "special circumstances" should be defined broadly, within reason, to allow local authorities to consider circumstances such as the conditions for the prior approval of the existing structure, whether the application will create a condition for variance relief, [5] whether the structure is "stealth" prior to modification, and whether a building or safety code, or state's environmental or historic preservation law, will be violated. Moreover, local governments should be able to approve a covered request subject to conditions or alterations based upon such "special circumstances."

In addition, a State or local government need not grant a request that would result in an increase in height or size above the maximum height or size permitted by an applicable zoning ordinance. Similarly, local authorities should be able to deny an application for an otherwise covered modification if the structure, as modified, would not meet the fall zone or setback distance that its ordinance requires.

Last but not the least, Section 6409(a) cannot be reasonably construed to be applicable to local governments acting in a proprietary capacity and restrain their proprietary decisions.

Uniform time limit for the processing of requests

If the Commission were to establish a uniform time limit for the processing of requests under Section 6409(a), which the League opposes, the Commission should not adopt any period shorter than the 90 days set in the 2009 Declaratory Ruling. That Ruling established 90 days as a "presumptively reasonable period of time" to process "*collocation"* applications. However, review of replacement or removal requests may be conceivably more time-consuming. Therefore, any period for review of replacement or removal requests should be longer than 90 days. For example, in New Jersey, similar processing time limit has been codified as 120 days. *See N.J.S.A.* 40:55D-73 & *N.J.S.A.* 40:55D-6. The League believes that 120 days is more appropriate for all covered requests.

[5] For example, in New Jersey, a wireless-equipment collocation application can be exempt from site plan review, if the applicant has, among others, obtained all necessary prior approvals, complied with all conditions for prior approvals, and will not create a condition for variance relief. *N.J.S.A.* 40:55D-46.2.

In addition, the final rule should provide that a municipality may toll the running of the period if it notifies the applicant in writing that an application is incomplete and specifies the additional information or documentation required. The applicable period shall be tolled by the time between the written notice and the date on which the application is completed.

CONCLUSION

For the reasons stated above, the League believes that the rule proposed to implement Section 6409(a), in its current form, will not only disturb the desirable balance between federal communication policy and local concerns, but also unconstitutionally commandeer State and local officials to enforce a federal zoning program. The League thus respectfully urges the Commission to adopt our comments and preserve necessary local discretion by interpreting statutory language contained in Section 6409(a) in a balanced and flexible fashion. In addition, the Commission should refrain from dictating to local authorities that administrative staff, and not elected or appointed boards, should review all applications. Moreover, the FCC should confirm in its final rule that there are "special circumstances" under which Section 6409(a) would permit a State or local government to deny an otherwise covered request.

Very truly yours,

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